***United States Court of Appeals***

***for the Second Circuit***

# APPENDIX

# 76-1198

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

To be argued by:
PHYLIS SKLOOT BAMBERGER

BBS

UNITED STATES OF AMERICA,

Appellee,

-against-

DAVID DURANT,

Appellant.

Docket No. 76-1198

APPENDIX FOR APPELLANT
DAVID DURANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.
THE LEGAL AID SOCIETY
Attorney for Appellant
DAVID DURANT
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

PHYLIS SKLOOT BAMBERGER

Of Counsel

PAGINATION AS IN ORIGINAL COPY

STATES DISTRICT COURT — CRIMINAL DOCKET

Felony [X] Minor Offense [ ] Misdemeanor [ ]

JUDGE/MAGISTRATE: 207 (District) / 1 (Office) — Assigned Trial: 0716 — Disp./Sentence

• U.S. vs. DURANT, DAVID — defendant

Case Filed: Day — Mo. — Yr. 75 — Doc. 776 — No. of Defdts. 3

COSTANTINO

MAGR. CASE NO. 75 M

CHARGES

| | | |
|---|---|---|
| 18:2113(a) | Bank Robbery | 1 |
| 18:2113(d) | Bank Robbery and use of a dangerous weapon | 1 |

BAIL/RELEASE: [ ] Denied — [ ] Personal R — [ ] Unsecured — [ ] Conditional Rel — AMT Set (000) $ 50 — [ ] 10% D — [X] Surety — [ ] Collat — [ ] 3rd P — Custo — [ ] PSA — [ ] Date Bail Not Made — [ ] Bail Status Changed (See Docket)

ATTORNEYS: Jonathan Marks

Hal Meyerson
80 Broad St. NYC.10004
944-4500

ARREST: [ ] U.S. Custody Began on Above Charges or [ ] Prosecution Deferred — [ ] High Risk Defn. & Date Design'd

INDICTMENT [X] / Information [ ]: 10/21/75 — Waived [ ] — Superseding [ ] Indict/Info [ ]

ARRAIGNMENT: 11-13-75 — 1st Plea: 11-13-75 — Final Plea

Trial Set For: 2-2-76 — XX Not Guilty — [ ] Nolo — [ ] Guilty — [ ] Not Guilty — [ ] Nolo — [ ] Guilty

TRIAL: Voir Dire [ ] — Trial Began [X] 2-2-76 [ ] N — Trial Ended

SENTENCE: Disposition — [ ] Convicted — [ ] Acquitted — [ ] Dismissed: — [ ] Nolled/Discontinued* — [ ] On All C — [ ] On Lesse Offense(s) — [ ] WOP; [ ]

| | Issued/Return/Served | DATE | INITIAL/No. |
|---|---|---|---|
| Search Warrant | Issued | | |
| | Return | | |
| Summons | Issued | | |
| | Served | | |
| Arrest Warrant | | 10/11/75 | MS/070B |
| COMPLAINT | | 10/11/75 | MS/070B |
| OFFENSE (In Complaint) | | Armed Bank Robbery T-18 USC Section 2113(a)(d). | |

INITIAL APPEARANCE — INITIAL/No.

PRELIMINARY EXAMINATION OR REMOVAL HEARING — Date Scheduled — Date Held — [ ] Waived — [ ] Not Waived — [ ] Intervening Indictment

Tape No. — INITIAL/No.

OUTCOME: [ ] Dismissed — [ ] Held for District GJ — BOND: [ ] Exonerate — [ ] To Transf District — [ ] Held to Answer to U. S. District Court — AT:

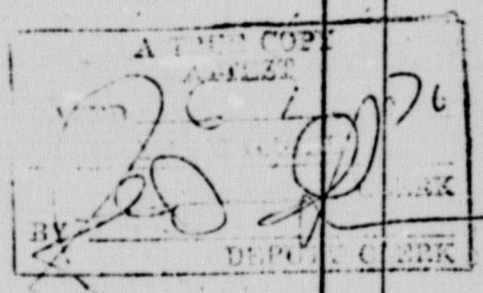
Magistrate's Initials ▷ HM

• Show last names and suffix numbers of other defendants on same indictment/information

Michael Reed-1 John Doe-3

| DATE | PROCEEDINGS | V. Excludable Delay (a) | (b) | (c) |
|---|---|---|---|---|
| 10/21/75 | Indictment Filed. See CR File. | | | |
| 10/21/75 | Before NEAHER,J.- Indictment filed-bench warrant ordered and issued | | | |
| 10/28/75 | Before COSTANTINO,J.-Case called- deft not present-case adjd to 11/14/75 at 10:00 A.M. for trial | | | |
| 11-13-75 | Before COSTANTINO J - case called - deft produced on a Bench Warrant -deft arraigned and the court enters a plea of not guilty - court to appoint counsel - bail set at $50,000 surety - Bench Warrant retd and filed - Executed. | | | |
| 11-14-75 | Order appointing counsel filed. BY Costantino | | | |
| 11-19-75 | Govts Notice of Readiness for Trial filed. | | | |
| 11-25-75 | Before COSTANTINO J - case called - deft & atty Hal Meyerson present - motion for reduction of bail - bail set at $50,000 -$5,000 cash - all motions by 12-19-75 and trial date set for Jan. 12, 1976 at 10:00 am. | | | |
| 12/11/75 | Notice of motion for bill of particulars and memorandum of law filed. ret. 12/16/75 | | | |
| 12-16-75 | Before COSTANTINO J - case called - deft not present - counsel Hal Meyerson present - defts motion for bill of particulars granted and denied as indicated on the record. | 2 | 12/11 | E |
| 1-13-76 | Before COSTANTINO J - case called - deft | | | |

| DATE | IV. PROCEEDINGS (continued) | V. EXCLUDABLE DELAY (a) | (b) | (c) | (d) |
|---|---|---|---|---|---|
| 2-2-76 | Before COSTANTINO, J. - Case called. Deft & counsel Hal Meyerson present. Trial ordered and begun. Deft moves for dismisaal of the indictment. Motion denied. The jury was selected and sworn in. Trial continued to 2-3-76. | | | | |
| 2/3/76 | Before COSTANTINO,J.- Case called- deft and counsel present- Trial resumed- trial contd to 2/4/76 | | | | |
| 2-4-76 | Before COSTANTINO J - case called - deft & counsel present - trial resumed - Govt rests - defts motion to dismiss and for Judgment of Acquittal is denied - deft rests - Judge charges Jury at 4:15 PM - alternate juror discharged - Marshals sworn - Jury retires to deliberate at 4:45 PM -Order of sustenance signed - Jury returns at 11:50 PM and renders its verdict of guilty on count 2- trial concluded - Jury discharged - defts motion to set aside verdict - denied - Order of transportation signed - sentence adjd without date. | | | | |
| 2-4-76 | By Costantino J - Two orders of sustenance filed. | | | | |
| 4/9/76 | Before COSTANTINO,J.- Case called- adjd to 4/13/76 for sentence | | | | |
| 4-13-76 | Before COSTANTINO, J.- case called -deft & counsel H.Meyerson present - deft sentenced to imprisonment for a period of 15 years pursuant to 18:4208(a)(2). Deft advised of right to appeal. Court to appoint counsel on appeal for the deft. | | | | |
| 4-13-76 | Judgment & Commitment filed - certified copies to Marshal. | | | | |
| 4-13-76 | Notice of Appeal filed. | | | | |
| 4-13-76 | Docket entries and duplicate of Notice mailed to the Court of Appeals | | | | |
| 4/21/76 | Certified copy of Judgment and Commitment retd and filed- deft delivered to MCC | | | | |
| 5/3/76 | Order received from court of appeals that record be filed on or before 6/2/76 | | | | |
| 5/14/76 | Certified copy of Judgment and Commitment retd and filed- deft delivered to USP at Atlanta Ga | | | | |
| 6/1/76 | Record on appeal certified and handed to Joan Gill for delivery to court of appeals | | | | |



RJD:JMM:lm
F. 753584

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA

-against-

MICHAEL REED,
DAVID DURANT and
JOHN DOE, also known as "Henry",

Defendants.

- - - - - - - - - - - - - - - - - - - - - - X

INDICTMENT

Cr. No. _____
(T. 18 U.S.C. §2113(a) and (d) and §2)



THE GRAND JURY CHARGES:

COUNT ONE

On or about the 10th day of October 1975, within the Eastern District of New York, the defendants MICHAEL REED, DAVID DURANT and JOHN DOE, also known as "Henry", knowingly and wilfully, by force, violence and intimidation, did take from the person and presence of employees of the Chase Manhattan Bank, 217-01 Linden Boulevard, Queens, New York, approximately Three Thousand Two Hundred Fifty-Seven Dollars and Eighteen Cents ($3,257.18), in United States currency, which money was in the care, custody, control, management and possession of the said Chase Manhattan Bank, the deposits of which bank were then and there insured by the Federal Deposit Insurance Corporation. (Title 18 United States Code, §2113(a) and §2).

THE GRAND JURY CHARGES:

OCT 21 1975

TIME A.M. .....
P.M. .....

COUNT ONE

On or about the 10th day of October 1975, within the Eastern District of New York, the defendants MICHAEL REED, DAVID DURANT and JOHN DOE, also known as "Henry", knowingly and wilfully, by force, violence and intimidation, did take from the person and presence of employees of the Chase Manhattan Bank, 217-01 Linden Boulevard, Queens, New York, approximately Three Thousand Two Hundred Fifty-Seven Dollars and Eighteen Cents ($3,257.18), in United States currency, which money was in the care, custody, control, management and possession of the said Chase Manhattan Bank, the deposits of which bank were then and there insured by the Federal Deposit Insurance Corporation. (Title 18 United States Code, §2113(a) and §2).

COUNT TWO

On or about the 10th day of October 1975, within the Eastern District of New York, the defendants MICHAEL REED, DAVID DURANT and JOHN DOE, also known as "Henry", knowingly and wilfully, by force, violence and intimidation, did take from the person and presence of employees of the Chase Manhattan Bank, 217-01 Linden Boulevard, Queens, New York, approximately Three Thousand Two Hundred Fifty-Seven Dollars and Eighteen Cents ($3,257.18), in United States currency, which money was in the care, custody, control, management and possession of the said Chase Manhattan Bank, the deposits of which bank were then

(1)

and there insured by the Federal Deposit Insurance Corporation and in commission of this act and offense the defendants MICHAEL REED, DAVID DURANT and JOHN DOE, also known as "Henry" did assault and place in jeopardy the lives of the said bank employees, as well as the lives of other persons present, by the use of dangerous weapons. (Title 18 United States Code, §2113(d) and §2).

A TRUE BILL.

William P. Esposito
FOREMAN

David G. Trager
DAVID G. TRAGER
United States Attorney
Eastern District of New York

THE COURT: At the outset, before I start on the charge proper, I wish to say to you just in case you have gotten the wrong impression, I think I told you when I selected you, that the defendant need not do anything during the trial, nor need he give any explanation for anything or any fact during the trial. And I say that prior to giving you the charge I'm going to make now.

Now that you have heard the evidence and the arguments, it becomes my duty to give you the instructions of the Court as to the law applicable to this case. It is your duty as jurors to follow the law as stated in the instructions of the Court, and to apply the rules of law so given to the facts as you find them from the evidence in the case. You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.

Neither are you to be concerned with the wisdom of any rule of law stated by the Court. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon

any other view of the law than that given in these instructions of the Court. Just as it would be a violation of your sworn duty as judges of the facts to base a verdict upon anything but the evidence in the case.

Justice through trial by jury must always depend upon the willingness of each individual juror to seek the truth as to the facts, from the same evidence presented to all the jurors, and to arrive at a verdict by applying the same rules of law as given in the instructions of the Court.

You have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations of the indictment and the denial made by a not guilty plea of the accused. You are to perform this duty without bias or prejudice to any party. The law does not permit jurors to be governed by sympathy, prejudice or bias. Both the accused and the public expect that you will carefully and impartially consider all the evidence in the case, follow the law as stated by the Court, and reach a just verdict, regardless of the consequences.

The attorneys, both for the government and the defendant, have been permitted by the Court and by the rules to make opening statements and summations to you. Under no circumstances are the statements they have made, by way of opening or by way of summation, to be taken as evidence. However, the Court and law does permit you to take the arguments that they have proffered before you and weigh those arguments. And if you agree with what they have said, on either side of the case, you may use those arguments in your deliberations, in discussing the case with each other, and try to convince one another as to what the final determination shall be with reference to the deliberations at hand. If you feel that the arguments are not commensurate with the testimony and the proof in the case, you may disregard them.

The arguments are not evidence, you need not weigh them. However, there are times when the arguments of the attorneys will give you an insight as to something you may have missed, and you may [illegible] this portion, if you so desire.

As I have already instructed you, the Court will be the judge of the law. You may recall that some motions were argued at side bar or that you were asked to leave the courtroom from time to time. That was not for the purpose to keep any proof from you, but were matters of law that were discussed between the attorneys and the Court itself, and should not have come before you.

In any event if you feel that you have discovered, by some stretch of your imagination, what this Court thinks as to either some of the testimony or the case itself, you should remove that from your mind. I have not indicated to you in any way whatsoever what my feeling is with reference to the facts in the case, or with reference to the guilt or innocence of the defendant. That is your province and your job. You should not try to weigh what you believe the Court's impression may be.

You must understand that the lawyers who appear before you are advocates. They are advocating the best case they can for the parties they represent. And they have a right to

exercise as much forcefulness as they desire in their questioning or otherwise in presenting this case.

During my pre-charge, I told you, among other things, that the questions asked by the attorneys are never to be considered as evidence, even though the question may contain a statement of evidence. You are reminded that only the answer to the question is evidence, if, of course, a question was answered.

Of course, you know by now that this case has come before you by way of an indictment presented by a Grand Jury sitting in the Eastern District. I shall now read the indictment to you. Remember, an indictment is merely an accusation, merely a piece of paper. It is not evidence, it is not proof of anything:

"Count one: On or about the 10th day of October 1975, within the Eastern District of New York, the defendants Michael Reed, David Durand, and John Doe, also known as Henry, knowingly and willfully, by force, violence, intimidation, did take from the person and presence of employees of the

Chase Manhattan Bank, 217-01 Linden Boulevard, Queens, New York, approximately $3,257.18 in United States currency, which money was in the care, custody, control, management or possession of the said Chase Manhattan Bank, depositors of which bank were then and there insured by the Federal Deposit Insurance Corporation."

And this charge is under Title 18, United States Code, Section 2113 (A). And too, the exact amount taken from the bank need not be proved. It is sufficient that the United States currency was taken or money. Section 2113 (A) of Title 18 reads, in pertinent part, as follows:

"Whoever by force or violence or by intimidation takes or attempts to take from the person or presence of another, any property or money or any other thing of value, belonging to or in the care, custody, control, management or possession of any bank, is guilty of a crime."

In order to convict the defendant of the crime charged in Count One, the government must

prove beyond a reasonable doubt the following three elements: First, the act or acts of taking from the person or presence of another, money belonging to or in care, custody, control, management or possession of a bank, as charged. Second, the act or acts of taking such money by force or violence or by means of intimidation. And third, that such acts were done with wrongful intent, that is, knowingly and willfully.

The charges in the indictment require the government to prove that the defendant knowingly and willfully performed acts in violation of law.

The Court will, therefore, define the words "knowingly" and "willfully."

"A fact is done knowingly, if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason."

The purpose of the word "knowingly" was to insure that no one would be convicted for an act done because of a mistake or accident, or other innocent reason.

An act is done willfully if done voluntarily and intentionally, and with specific

intent do something. The law forbids, that is to say, with bad purpose, either to disobey or to disregard the law.

As I have said, the money taken must have been in the care, custody, control, management or possession of the bank.

The law recognizes two kinds of possession, actual and constructive possession. A person who knowingly has a direct physical control over a thing at a given time is then in actual possession of it. A person, although not in actual possession, knowingly has both the power and intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it.

You may find that the elements of possession, as that term is used in these instructions, is present, if you find beyond a reasonable doubt that the bank had actual or constructive possession either alone or jointly with others.

To take by intimidation means willfully to take by putting in fear of bodily harm; such fear must arise from the willful conduct of the

accused, rather than from some more temperamental timidity of the victim. However, the fear of the victim need not be so great as to result in terror, panic or hysteria.

A taking by intimidation must be established by proof of one or more acts or statements of the accused which are done or made in such a manner, and under such circumstances, as would produce in the ordinary person, fear of bodily harm. However, actual fear need not be proved. Fear, like intent, may be inferred from statements made and acts done or admitted by the accused, and by the victim as well, and from all surrounding circumstances shown by the evidence in the case.

"Bank" is defined as any member or bank of the Federal Reserve system, and any banking institution organized or operating under law of the United States, and any bank that deposits of which are insured by the Federal Deposit Insurance Corporation.

Count two. On or about the 10th day of [illegible], within the Eastern District of New York, [illegible] did,

David Durant, and John Doe, also known as Henry, knowingly, willfully, by force, violence, intimidation, did take from the person and presence of employees of the Chase Manhattan Bank, 217-01 Linden Boulevard, Queens, New York, approximately $3,257.18, in United States currency, which monies were in the care, custody, control, management and possession of said Chase Manhattan Bank, the deposits of which bank were then and there insured by the Federal Deposit Insurance Corporation; and in commission of this act, and an offense, the defendants Michael Reed, David Durant and John Doe, also known as Henry, did assault and place in jeopardy, the lives of the said bank employees, as well as the lives of other persons present, by the use of dangerous weapons."

Title 18, United States Code, and this is under 2113, Subdivision (D), and Section 2.

Now, 2113 (D) of Title 18, United States Code, reads, in pertinent part, as follows:

"Whoever in committing or attempting to

commit an offense defined in Subsection (A) of this Section," and that would be Count One. "in addition thereto, assaults any person or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be guilty of a crime."

And that is 2113 (D).

In order to convict each of the defendants of the crime charged in Count Two, the Government must prove beyond a reasonable doubt all of the three elements included in Count One, plus one additional element; that is, that the defendant assaulted or placed in jeopardy the lives of any persons by use of a dangerous weapon or device.

The crime charged in Count Two of the indictment requires that the Government prove beyond a reasonable doubt, four essential elements: One, the act or acts of taking from the person and presence of another, money belonging to and in the care, custody, control, management and possession of a bank, as charged. Two, the act or acts of taking said money by force or

violence. Three, the act or acts of assaulting or putting in jeopardy the life of any person by use of a dangerous weapon or device, while engaged in stealing such money from the bank, as charged. And four, doing such act or acts knowingly and willfully.

"And willfully." Any willful attempt or threat to inflict injury upon the person of another, when coupled with an apparent present ability to do so, or an intentional display of force such as would give the victim reason to fear or expect immediate bodily harm, constitutes assault. An assault may be committed without actually touching or striking or doing bodily harm to the person of another.

So, a person who has the apparent present ability to inflict bodily harm or injury upon another person, and willfully attempts or even threatens to inflict such bodily harm, as by intentionally flourishing and pointing a pistol or a gun at another person, may be found to have assaulted such person.

To put in jeopardy the life of a person by the use of a dangerous weapon, means to expose

such person to a risk of death by use of a dangerous weapon. A dangerous weapon includes anything capable of being readily operated, manipulated, wielded or otherwise used by one or more persons, to inflict severe bodily harm or injury upon another person.

So, an operable firearm, such as a pistol, revolver or other gun, capable of firing a bullet or other ammunition, may be found to be a dangerous weapon or device.

Each of the counts also charge the defendant with being an aider and abetter in violation of Title 18 of United States Code Section 2. This section provides as follows:

> "Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> "B. Whoever willfully causes an act to be done which directly performed by him or another, would be an offense against the United States, is punishable as a principal." Which means they are not [illegible] each other; each one individually

stands as a principal.

In order to aid and abet another to commit a crime, it is necessary the accused willfully associate himself in some way with a criminal venture and willfully participate as he would in something he wishes to bring about. That is to say, that he willfully seeks by some act or omission of his, to make the criminal venture succeed.

An act or omission is willfully done if done voluntarily and intentionally, and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done. That is to say, with bad purpose either to disobey or to disregard the law.

You, of course, may not find any defendant, a defendant guilty unless you find beyond a reasonable doubt that every element of the offenses defined in these instructions was committed by some person or persons, and that the defendant participated in its commission.

You should consider Count Two of the indictment first. If you find the Government has

proved the essential elements of Count Two beyond a reasonable doubt, you may stop there, and you need not consider Count One.

If, however, you find that the Government has failed to prove the essential elements of Count Two, beyond a reasonable doubt, you should then consider Count One of the indictment.

There are two types of evidence from which you may find the truth as to the facts of a case, direct and circumstantial evidence. Direct evidence is the testimony of one who has certain actual knowledge of a fact, such as an eyewitness. And circumstantial evidence is proof of a chain of evidence indicating the guilt or innocence of the defendant. The law makes no distinction between the weight to be given to either direct or circumstantial evidence, nor is a greater degree of certainty required of circumstantial evidence than of direct evidence.

You should weigh all the evidence in the case. After weighing all the evidence, if you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find him not guilty.

A defendant is presumed innocent of the crime. Thus, the defendant, although accused, begins a trial with a clean slate and with no evidence against him. And the law permits nothing but legal evidence to be presented before a jury to be considered in support of any charge against the accused.

So, the presumption of innocence alone is sufficient to acquit the defendant, unless you, the jury, are satisfied beyond a reasonable doubt of the defendant's guilt, after careful and impartial consideration of all the evidence in the case.

It is not required that the Government prove guilt beyond all possible doubt. The test is one of reasonable doubt. And reasonable doubt is doubt based upon reason and common sense. The kind of doubt that would make a reasonable person hesitate to act.

Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that you would be willing to rely and act upon it, unhesitatingly, in the most important of your own affairs. You, the jury, will remember

that the defendant is never to be convicted on mere suspicion or conjecture. The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to the defendant. The law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

If the jury views the evidence in the case as reasonably permitting either of two conclusions, one of innocence, the other of guilt, you the jury must, of course, adopt the conclusion of innocence.

A reasonable doubt may arise not only from the evidence produced, but also from a lack of evidence. Since the burden is upon the prosecution to prove the accused guilty beyond a reasonable doubt of every essential element of the crime charged, a defendant has a right to rely upon failure of the prosecution to establish such proof.

I have said the defendant may be proven guilty either by direct or circumstantial evidence. And I've said direct evidence is testimony

of one who asserts actual knowledge of a fact, such as an eyewitness. Also, circumstantial evidence is proof of a chain of facts and circumstances, indicating the guilt or innocence of a defendant. You the jury may make common sense inferences proven from the facts. It is not necessary that all inferences be drawn from the facts in evidence, be consistent only with guilt and inconsistent with every reasonable hypothesis of innocence. The test is one of reasonable doubt and shoul' be based upon all the evidence, the testimony of the witnesses, the documents offered into evidence, and the reasonable inferences which can be drawn from the proven facts.

An inference is a deduction or conclusion which reason and common sense lead the jury to draw from the facts which have been proved.

You are to consider only the evidence in the case. But in your consideration of the evidence, you are not limited to the bold statements of the witnesses. On the contrary, you are permitted to draw from the facts, which you find have been proven, such reasonable inferences as seem justified in light of your own experiences.

You as the jurors are the sole judges of the credibility of the witnesses and the weight their testimony deserves. And it goes without saying that you should scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness' intelligence, motive and state of mind, and his demeanor or manner while on the stand. Consider his ability to observe the matters to which he has testified and whether he impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to each side in the case, the manner in which each witness might be affected by the verdict, and the extent to which, if at all, each witness is either supported or contradicted by the other evidence in the case.

Inconsistencies or discrepancies in the testimony of witnesses or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons, witnessing an incident or transaction,

may see or hear it differently. And an innocent misrecollection, like failure of recollection, is not an uncommon experience.

In weighing the effect of a discrepancy, always consider whether it pertains to the matter of importance, or unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you will give the testimony of each witness such credibility, if any, as you may think it deserves. The law does not compel a defendant in a criminal case to take the witness stand and testify. And no presumption of guilt may be raised and no inference of any kind may be drawn from the failure of the defendant to testify.

As stated before, the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

You are instructed that an accomplice in a crime is a competent witness against the perpetrators of the crime. An accomplice includes all persons connected with the offense by

an unlawful act or omission, either before, at the time of or after commission of the offense, whether such witness was present or participated in the crime or not. However, his testimony implicating the defendant as a perpetrator of the crime, is inherently suspect. For such a witness may well have an important and personal stake in the outcome of the trial.

And you would scrutinize his testimony with great care. An accomplice, on so testifying, may believe that the defendant's conviction will result in expected rewards that may have been either explicitly or implicitly promised to him, in return for his testimony.

The mere fact that a witness may be an accomplice does not mean that he cannot tell the truth. It only means that you are to examine his testimony with care. And if having done so, you believe it is the truth, then you are to give it the same credence as the testimony of other witnesses.

You have heard testimony in this case regarding certain fingerprints. The rules of evidence ordinarily do not permit witnesses to

testify as to opinions or conclusions. An exception to this rule exists in those whom we call expert witnesses. A witness who by education and experience has become expert in some art, science or profession or calling, may state an opinion as to relevant and material matter in which they profess to be expert, and may also state their reasons for the opinion.

You should consider each expert opinion in this case -- we had two -- received in evidence in this case, and give it such weight as you may think it deserves.

If you should decide that the opinion of the expert is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, you may disregard the opinion entirely.

Every witness' testimony must be weighed as to its truthfulness. If you find any witness lied as to any material fact in the case, then the law gives you certain privileges. One of those privileges is that you have a right to disregard

the entire testimony of that witness.

If you find, however, that you can sift through the testimony to determine which of the testimony is true and which is false, then the law allows you to take the portion which is true and weigh it, and disregard those portions which are false. That again is within your prerogative.

The weight of the evidence is not necessarily determined by the number of witnesses testifying on either side. You should consider all the facts and circumstances in evidence, determine which of the witnesses are worthy of greater credence. You are not obliged to accept testimony, even though the testimony is uncontradicted and the witness is not impeached. You may decide because the witness' bearing or demeanor or because of the inherent improbability of his testimony, or for other reasons sufficient to you, that such testimony is not worthy of belief.

The Government is not required to prove the essential elements of the offenses as defined in these instructions by any particular number of witnesses. The testimony of a single witness

may be sufficient to convince you beyond a reasonable doubt of the existence of an essential element of the offense charged, if you believe beyond a reasonable doubt that the witness is telling the truth. There is nothing peculiarly different in the way a jury should consider the evidence in the criminal case, from that which all reasonable persons treat any question, depending upon evidence presented to them.

You are expected to use your good sense, consider the evidence in the case for only those purposes for which it has been admitted, and give it reasonable and fair construction, in the light of your common knowledge or the natural tendencies and inclinations of human beings.

If an accused be proved guilty beyond a reasonable doubt, say so. If not so proved guilty, say so.

Keep constantly in mind that it would be a violation of your sworn duty to base a verdict of guilty upon anything other than the evidence in the case.

And remember as well that the law never imposes upon a defendant in a criminal case, the

duty, the burden or duty of calling any witness or producing any evidence.

In making the factual determination on which your verdict will be based, you may consider only the exhibits which have been admitted in evidence and the testimony of witnesses you heard in this courtroom.

Punishment provided by law for the offense charged in the indictment is a matter exclusively within the province of the Court. And it shall never be considered by the jury in any way. It shall never be considered by the jury in any way in arriving at an impartial verdict as to the guilt or innocence of the accused.

If any reference by the Court or by Counsel to matters of evidence does not coincide with your own recollection, it is your recollection which should control during deliberations.

Now, in this type of case, there must be a unanimous verdict. That means all twelve of you must agree. And it goes without saying that it becomes incumbent upon you to listen to one another and to argue out the points among yourselves in order to determine in good conscience

whether your fellow juror's argument is one commensurate with yours, or whether you can in good conscience agree with him. You have no right to stubbornly and idly sit by and say, "I'm not talking to anyone. I'm not going to discuss it." Because people with common sense and the ability to reason must communicate their thoughts.

So anything which appears in the record, and about which one of you may not agree, talk it out among yourselves, and then if you can't agree as to what is in the record, well you can ask the Court to have that portion of the testimony read back to you.

You may do so by knocking on the door and giving a note in writing to the marshal, who will then present it to the Court, and I will then bring you into the courtroom.

Juror Number One, you are the foreman of this jury and you will be the one to announce the verdict. When you arrive at a verdict, and that means all twelve must arrive, including yourself. And the form of your verdict will be if you should find the defendant not guilty as to both counts, you are to announce "We find

the defendant not guilty as to both counts."
If you should find the defendant guilty as to Count Two, then you would announce that verdict as to count two, and it would be no need for you to decide count one, as you heard in my instructions. If you should find the defendant not guilty as to count two, then you would go to count one, and if you should find him guilty as to count one, you are to announce that as your verdict unanimously as to count one. And those would be the forms of your verdicts.

So you would have a not guilty as to both counts, a guilty as to one of the two counts, but not as to both counts that he's been charged with.

All right now, it's ten to five. What I'm going to do, I think, is have you, first of all, give your telephone numbers to the marshal, if you wish to make some calls to home. And then I will have you sent out to supper, so I don't get you back too late. And after that, you'll start deliberating. Do not deliberate now.

Alternate juror, you may go with them to supper, if you so desire, and you'll be excused

immediately after they start returning. You need not come back to the courtroom, you may be excused right from the restaurant.

Any objection to that? Any objection?

MR. KAPLAN: I have no objection, your Honor. I think you should ask the jury now if they want to start deliberating now.

THE COURT: I would rather do it this way, and then I'll get them back.

As to the exhibits, you may have all the exhibits that are in evidence, as I've told you, and all you must do is send a note into the Court, and the Court will send them in to you.

Now, as to the guns, I don't believe that it's necessary for you to have them in the jury room. If you wish, I will have the attorney at this time, just pass by with the guns.

They don't need them in the jury room. Any objection?

MR. KAPLAN: Do you want to see the guns? Can you see them? Have you all seen them?

Okay. Then it's not necessary. All right.

MR. MEYERSON: Your Honor, can we approach the bench for a minute?

(Whereupon, at this time, there is a side bar conference.)

MR. MEYERSON: Your Honor, only as to the point of the accomplice, you said before or during. I believe accomplice could also be subsequent, especially --

THE COURT: And after. I had the word "after" in there, too.

MR. MEYERSON: I didn't hear it.

THE COURT: It's in there.

MR. MEYERSON: I'm sure I didn't hear it. Could you say that?

MR. KAPLAN: I don't think --

MR. MEYERSON: Because I have been following it very carefully.

MR. KAPLAN: I think it's an accomplice charge here.

MR. MEYERSON: And the Foreman leaned forward and listened at that point, and I definitely --

MR. KAPLAN: He just wants this accomplice charge as the last thing they hear. That's so obvious.

It's in the charge.

MR. MEYERSON: You might have had it, but I don't know -- you might have just, you know, you think you say something.

THE COURT: My glasses, I can't read without them.

MR. MEYERSON: Do you remember?

THE COURT: This is the charge.

Let's see. What defense act or omission, either before, at the time or after the commission of the offense.

MR. MEYERSON: I'm sure I didn't hear that, your Honor.

THE COURT: It's in there. I read it to them. Okay.

(The Marshal is duly sworn by the Clerk of the Court.)

THE CLERK: All right, now, do not talk about the case yet.

THE FOREMAN: Can I ask a question, your Honor? Or can I approach the bench?

My fellow jurors asked -- if the verdict is reached this evening, what is the procedure for tomorrow? Do we report to the

court downstairs?

THE COURT: Oh, I don't know whether they need jurors tomorrow. I can find out for you.

THE FOREMAN: Please, your Honor.

THE CLERK: I did find out. The Jury Clerk told me that if there is a verdict tonight, the jurors should not come back tomorrow or Friday. Come back Monday morning at nine o'clock.

THE FOREMAN: Thank you very much.

THE MARSHAL: Jury, step this way, please.

(At this time, the jury leaves the courtroom to commence deliberations.)

CERTIFICATE OF SERVICE

August 20, 1976

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.

Ralph S/Alan Bamberger